

## PRIVATE ACTIONS UNDER SECTIONS 4 AND 7 OF THE CLAYTON ACT: A FRESH LOOK AT AN OLD PROBLEM

A recent antitrust case raised two interesting questions that have not yet been resolved. *Dailey v. Quality School Plan, Inc.*<sup>1</sup> was a suit for treble damages brought under section 4 of the Clayton Act.<sup>2</sup> The plaintiff, Dailey, was a sales supervisor for Educational Reader's Service, Inc. (ERSI) and was paid an annual salary plus a commission of one per cent on all ERSI sales in his area. ERSI was in the business of selling magazine subscriptions under a "school plan" method, and its sales represented thirty-nine per cent of the relevant market. Quality School Plan, Inc. (Quality) was ERSI's major competitor with sales amounting to forty-three per cent of the market. As a result of the acquisition of ERSI by Quality, Quality controlled eighty-two per cent of the "school plan" business in the United States, with the balance going to Curtis Publishing Company. Dailey retained his job for about one year after the merger and was then dismissed. He brought suit under section 4 of the Clayton Act alleging the merger violated both section 1 of the Sherman Act<sup>3</sup> and section 7 of the Clayton Act,<sup>4</sup> and that he had lost his job as a result of the unlawful merger. The district court<sup>5</sup> held that Dailey was not protected by section 4 of the Clayton Act because he had not been injured in his trade or business, and also because he had not sufficiently alleged a causal connection between the merger and his injury—i.e., his injury was a mere incidental result of the acquisition. The court of appeals disagreed on both counts. Arguing an additional ground for dismissal before the appellate court, the defendant contended that section 7 of the Clayton Act is not an anti-trust law within the meaning of section 4 of Clayton. Again the court of appeals disagreed. This note will address itself to both these issues and will attempt to suggest some improvements that should be made in this area.

### I. PERSONS PROTECTED BY SECTION 4 OF THE CLAYTON ACT<sup>6</sup>

Section 4 of Clayton is in no way equivocal about who is entitled to maintain suit for treble damages:

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<sup>1</sup> 380 F.2d 484 (5th Cir. 1967).

<sup>2</sup> 15 U.S.C. § 15 (1964).

<sup>3</sup> *Id.* § 1.

<sup>4</sup> *Id.* § 18.

<sup>5</sup> Opinion unreported.

<sup>6</sup> Leading articles on this same question include, Bergstrom, *The Private Litigant's Standing to Sue*, 7 ANTITRUST BULL. 3 (1962); Clark, *Treble Damages Bonanza*:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Partly because of their prior experience in the common law of torts and partly because of the treble damage feature of the remedy, courts hastened to read limitations into the statute. Justice Holmes stated the principle normally applicable in tort cases when he said:

As a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong . . . . The law does not spread its protection so far . . . .<sup>7</sup>

And Judge Kirkpatrick expressed his concern about the treble damage feature of the remedy when he noted:

In determining the scope of the Act it must be remembered that the treble damage feature is an enforcement provision and superimposes a penalty upon compensation. As such it should not be literally construed if unreasonable results would be reached by so doing. Obviously, there must be a limit somewhere.<sup>8</sup>

Other courts have mentioned the unfairness involved in permitting those persons only incidentally injured to receive a windfall gain,<sup>9</sup> the danger of the flood of litigation,<sup>10</sup> the burden placed upon industry,<sup>11</sup> and the fact that more than one plaintiff might recover treble damages for the same injury.<sup>12</sup>

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*New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954); Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-on Doctrine*, 32 A.B.A. ANTITRUST J. 5 (1966); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damages Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231 (1961); Whipple, *Two Aspects of Plaintiffs' Treble Damage Suits: Class Actions; Person Injured and Standing to Sue*, 8 A.B.A. ANTITRUST SECTION 27 (1956); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

<sup>7</sup> *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927).

<sup>8</sup> *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa.) *aff'd*, 211 F.2d 405 (3rd Cir. 1953), *cert. denied*, 348 U.S. 828 (1954).

<sup>9</sup> *Snow Crest Beverages, Inc. v. Recipe Foods Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

<sup>10</sup> *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3rd Cir. 1910).

<sup>11</sup> *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa.), *aff'd*, 211 F.2d 405 (3rd Cir. 1953), *cert. denied*, 348 U.S. 828 (1954).

<sup>12</sup> *Ames v. American Tel. & Tel. Co.*, 166 F. 820, 823 (C.C.D. Mass. 1909).

The statute sets out three conditions precedent to recovery. The plaintiff must allege and prove: (1) that there has been a violation of the antitrust laws; (2) that he has suffered an injury to his business or property; and (3) that the injury was caused by the violation of the antitrust laws.<sup>13</sup> The courts have generally construed each of these elements in such a limited manner that large numbers of plaintiffs are unable to withstand a motion to dismiss because they lack "standing".<sup>14</sup> The first element is that plaintiff must allege a violation of the antitrust laws. This will be treated later when section 7 of the Clayton Act is considered. The second element is that plaintiff must be injured in his business or property. Mere public injury is not sufficient, for the government is charged with the responsibility of protecting the public.<sup>15</sup> Although there was some initial confusion,<sup>16</sup> it is settled today that one's employment is his "business".<sup>17</sup> The district court in *Dailey* appears to be wrong on this point. Most of the cases that have denied standing to an employee have done so on the basis of proximate cause—indirectness of injury—rather than on his lack of a business.<sup>18</sup> This leaves the most troublesome of the three elements—proximate cause.

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<sup>13</sup> Some courts have attempted to add a fourth element to plaintiff's case by requiring that he show an injury to the public. *Shotkin v. General Elec. Co.*, 171 F.2d 236 (10th Cir. 1948); *I.P.C. Distrib., Inc. v. Local 110, Chicago Moving Picture Mach. Operators Union*, 132 F. Supp. 294, 298 (N.D. Ill. 1955). However, when there is a per se offense, no such injury need be shown. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). And when the conduct is judged by the "rule of reason", public injury must be shown before a violation of the law will be found. Thus public injury is never a separate element in plaintiff's case.

<sup>14</sup> In the first 50 years of the Sherman Act (1890-1940), only 13 plaintiffs won their suits for treble damages out of a total of 175 cases. S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS* 874 (3rd. ed. 1968). During the period from 1952 to 1958, plaintiffs had somewhat better success with 20 victories in 144 suits. And if settled cases are included, plaintiffs stand about a 30% chance of winning something. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5, 11, 14 (1959).

<sup>15</sup> *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Revere Camera Co. v. Eastman Kodak Co.*, 81 F. Supp. 325 (N.D. Ill. 1948).

<sup>16</sup> See *Corey v. Boston Ice Co.*, 207 F. 465 (D. Mass. 1913), where the court dismissed a suit by a plaintiff, who was a director and the president of the Independent Ice Company and who alleged he lost both of these positions because of defendant's illegal acquisition, on the ground that plaintiff had no "property right" in these positions. *Id.* at 466.

<sup>17</sup> *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967); *Vincs v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948); *Roseland v. Plister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942).

<sup>18</sup> *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951). *Contra*,

A stockholder of an injured corporation is denied standing because the injury was directed at the corporation rather than at the stockholders;<sup>19</sup> a stockholder, creditor, officer, employee, and general sales agent all rolled into one is denied standing because the injury was to the corporation;<sup>20</sup> a sole stockholder, officer, creditor, and landlord is denied standing for the same reason;<sup>21</sup> a landlord, whose rentals are diminished because of a conspiracy aimed at his tenant, fails to establish standing;<sup>22</sup> a supplier of an injured corporation does not have standing;<sup>23</sup> and an employee of an injured corporation is denied standing.<sup>24</sup> On the other hand, an exclusive sales agent for an injured corporation is granted standing because he is injured in his business;<sup>25</sup> a stockholder who has suffered an injury to his stockholdings as a result of a conspiracy aimed at him has standing;<sup>26</sup> a landlord who receives lower rentals because of a conspiracy aimed at him,<sup>27</sup> or because of a conspiracy entered into by his tenant<sup>28</sup> is granted standing; an employee has standing when the illegal conspiracy is directed at him;<sup>29</sup> and finally, one recent decision has allowed standing to a principal stockholder, officer, and employee of an injured corporation.<sup>30</sup> As Judge Kirkpatrick noted, it is virtually impossible to reconcile all of these holdings with a general rule so as to determine which injuries are too remote to bring the plaintiff

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*Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389 (S.D. N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940); *Gerli v. Silk Ass'n of Am.*, 36 F.2d 959 (S.D. N.Y. 1929).

<sup>19</sup> *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3rd Cir. 1910); *Ames v. American Tel. & Tel. Co.*, 166 F. 820 (C.C.D. Mass. 1909).

<sup>20</sup> *Gerli v. Silk Ass'n of Am.*, 36 F.2d 959 (S.D. N.Y. 1929).

<sup>21</sup> *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389 (S.D. N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

<sup>22</sup> *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Pa.), *aff'd*, 211 F.2d 405 (3rd Cir. 1953), *cert. denied*, 348 U.S. 828 (1954).

<sup>23</sup> *Volasco Prod. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962); *but cf. Sanitary Milk Producers v. Bergjams Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966).

<sup>24</sup> *Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 338 (E.D. La.), *aff'd*, 323 F.2d 363 (5th Cir. 1963).

<sup>25</sup> *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942). *See also Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948); *McWhirter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456 (W.D. Mo. 1948).

<sup>26</sup> *Peter v. Western Newspaper Union*, 200 F.2d 867 (5th Cir. 1953); *Rothberg v. National Banner Corp.*, 259 F. Supp. 414 (E.D. Pa. 1966).

<sup>27</sup> *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

<sup>28</sup> *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957).

<sup>29</sup> *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967).

<sup>30</sup> *Data Digests, Inc. v. Standard & Poor's Corp.*, 36 U.S.L.W. 2425 (S.D. N.Y. Dec. 30, 1967).

within the scope of the Act.<sup>81</sup> Probably the most that can be said is that if the plaintiff is in competition with the violator, or if the violator has aimed at him,<sup>82</sup> or in some cases if the illegal conduct has impaired plaintiff's business relations with the injured party, or in even fewer cases, if plaintiff is in privity with the defendant,<sup>83</sup> he will have standing. A general trend is for the courts to become more liberal with their standing requirements; this is especially true in the employee cases. In the *Dailey* case, plaintiff's relations with the injured party were severed as a result of the alleged violation. While there is precedent going both ways in similar fact situations, the decision in *Dailey* favoring standing appears to be supported by the weight of authority, and is in line with current trends.

## II. ELIMINATION OF MANDATORY TREBLE DAMAGES

Many have condemned the courts for creating such strict standing requirements. It is said that this has created unwarranted confusion, has deprived deserving plaintiffs of their just rewards, and has contravened Congress' intent in passing the Act. Undoubtedly the requirement has created confusion and has deprived deserving plaintiffs, but it is not at all clear that Congress' intent has been ignored, or that the courts have adopted an unsound policy in light of the present law. One commentator has suggested that it is impossible to determine Congress' intent in passing the statute, and that "[t]hose who speak glibly of what Congress 'intended' are frequently telling us more of their own views and predilections, rather than those of Congress."<sup>84</sup> And even if one desires to engage in such a guessing game, the most logical conclusion is that Congress approves the policy of restricting the scope of section 4 of Clayton. An identical provision was first passed in 1890.<sup>85</sup> Almost immediately the courts imposed strict standing requirements and Congress has not once changed a word in the statute.

A far more productive pastime than conjecturing about Congress' intent in 1890 is planning an effective course for the future.

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<sup>81</sup> *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa.), *aff'd*, 211 F.2d 405 (3rd Cir. 1953), *cert. denied*, 348 U.S. 828 (1954).

<sup>82</sup> *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-on Doctrine*, 32 A.B.A. ANTI-TRUST J. 5, 17-19 (1966).

<sup>83</sup> *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa.), *aff'd*, 211 F.2d 405 (3rd Cir. 1953), *cert. denied*, 348 U.S. 828 (1954).

<sup>84</sup> Pollock, *supra* note 32 at 8-9.

<sup>85</sup> Sherman Act § 7, 26 Stat. 210 (1890).

One writer suggests that the two tests for proximate cause should be: (1) is the plaintiff within that class of persons entitled to protection under the Act, and (2) is the injury of the type that the statute was intended to guard against? As a supplement, the same writer suggests there should be a presumption in favor of standing.<sup>36</sup> Another writer prefers the "target area test": (1) does plaintiff fall within that category of persons toward whom the violation was generally directed, and (2) is the harm of the type the statute was intended to guard against?<sup>37</sup> Of the two, the "target area" principle is probably the most acceptable. The "Columbia test" adds nothing to existing law except a nebulous presumption, which the courts may or may not swallow. Proximate cause amounts to nothing more nor less than a policy judgment for courts to make. The courts must determine as a matter of policy whom they will protect and from what type of injuries. In other words, since 1890 the courts have been doing what the "Columbia test" asks them to do. The author of that test merely disagrees with their answers. The "target area" test is an improvement because it removes one factor from the realm of policy and puts it into the area of fact finding—i.e., was the harm generally directed at plaintiff. Thus, it would eliminate at least part of the confusion.

But it would appear that the best solution would be for Congress to remove the source of the trouble—mandatory treble damages. Kaysen and Turner (now Assistant Attorney General) have recommended that treble damages should be given only in those cases where the violation is wilful and would be subject to criminal prosecution.<sup>38</sup> This is an excellent proposition. At the same time, Congress should make it clear that anyone who can show a substantial economic injury, and who can further show that defendant's violation was a substantial factor in causing that injury, is entitled to receive compensatory damages (trebled when the violation

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<sup>36</sup> Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 587 (1964) [hereinafter referred to as the Columbia test].

<sup>37</sup> Pollock, *supra* note 32.

<sup>38</sup> C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 258 (1959). For other articles advocating such a change, see ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 378-9 (1955) [hereinafter referred to as ATT'Y GEN. REP.] Bicks, *supra* note 14. *Contra*, Lovinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); McConnell, *The Treble Damage Issue: A Strong Dissent*, 50 NW. U.L. REV. 342 (1955); Vold, *Are Threefold Damages Under the Antitrust Act Penal or Compensatory?*, 28 KY. L.J. 117 (1939); Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

is wilful), plus a reasonable attorney's fee and all the costs of the suit.<sup>39</sup> Congress should also make it clear that only the most frivolous claims should be washed out at the pleading stage. Whether plaintiff was "aimed at" or whether defendant could have foreseen the injury to plaintiff should be irrelevant in every case. In other words, proximate cause would be entirely eliminated from the law—only actual cause would be considered.

Neither the "Columbia test" nor the "target area" test advocates completely discarding proximate cause and probably most courts would not be willing to do so. The argument today concerns only the degree to which it should be used to deprive plaintiffs of standing. As long as treble damages are mandatory, standing should be limited. The remedy is "extraordinary". It works an extreme hardship upon unwitting violators of the law, and the courts do and should protect them when possible.<sup>40</sup> The defenders of treble-damage actions point out that they were intended to aid government enforcement, and that the government would have to quadruple its antitrust budget to take up the slack in enforcement if the incentive of treble damages were removed. Moreover, compensatory damages are not sufficient to cover both the tangible and intangible factors that accompany the loss of a business that one has worked a lifetime to build. There is more freedom and less governmental interference when private plaintiffs bring these actions than there would be if the government were forced to step up its enforcement. Finally, it is said that treble damage actions provide a greater deterrent to future violations than government actions do, and the deterrent is obviously greater than it would be if only compensatory damages were awarded.

But these arguments are not convincing. The incentives to private litigants are great now and they should become greater in the future. The statute of limitations is tolled during the government suit against the defendant,<sup>41</sup> a government victory against the defendant is *prima facie* evidence of a violation in the private suit,<sup>42</sup> proof of the amount of damages has been liberalized,<sup>43</sup> and the plain-

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<sup>39</sup> Today not all costs are recoverable, as plaintiff is limited to "taxable costs". See *Lovinger, supra* note 38 at 171.

<sup>40</sup> *Highland Supply Corp. v. Reynolds Metals Co.*, 245 F. Supp. 510, 514 (E.D. Mo. 1965).

<sup>41</sup> Clayton Act § 5(b), 15 U.S.C. § 16(b) (1964).

<sup>42</sup> Clayton Act § 5(a), 15 U.S.C. § 16(a) (1964).

<sup>43</sup> See *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

tiff not only recovers most of his costs of suit, he also receives a reasonable attorney's fee. An additional aid to plaintiffs could be enacted by requiring the government to file its evidence in court in any case in which it allows a consent decree.<sup>44</sup> This evidence would be made available to private litigants. There are some telling statistics on the effectiveness of treble damages.<sup>45</sup> Seventy-eight per cent of private suits follow a government victory against the defendant (this, of course, gives plaintiff his *prima facie* case against the defendant.) From 1952 to 1958 plaintiffs lost 124 cases and only won twenty. Seventy-two of the defeats were on a motion to dismiss. During the same period private litigants won eight suits for an injunction and lost only nine. Also, during the same period the government won thirty-one cases and lost thirty-nine. Twenty-seven of these government suits involved criminal charges and the standard of proof was higher. Further, the government settles eighty per cent of its cases—only the most difficult go to court. Bicks feels the dramatic lack of success of private litigants in treble damage suits is due to the strong distaste the courts have for the remedy. If success breeds incentive, the conclusion is inescapable that elimination of treble damages will increase the number of private actions brought. Thus it is doubtful that the government would be forced to increase its enforcement of the laws as a result of this change in the law. But even if this were the case, it is a poor justification for subjecting unintentional violators to such harsh consequences.

There is not much that can be said to combat the argument that compensatory damages will not compensate sufficiently. They are supposed to achieve that result. Success in twenty of 144 suits does not seem likely to compensate to any great extent. It is also quite possible that jury verdicts will increase if the award is not mandatorily trebled. And finally, there is little justification for treble damages for an unintentional economic injury when our system barely awards compensatory damages to the family of a pedestrian who is killed by the negligence of an automobile driver. Treble damages are not even mandatory when a person is intentionally murdered.

The argument that treble damages are a deterrent to unintentional violators of the law is just as weak. Again, success in twenty of 144 cases does not seem too frightening. If the violators were forced to think about the possibility of being held liable for any

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<sup>44</sup> Proposed by Lovinger, *supra* note 38 at 175.

<sup>45</sup> Bicks, *supra* note 14.



substantial injury to anyone they injure, and if they could not rely on the motion to dismiss in these cases, the deterrent effect would have to be greater than at present. Furthermore, many unintentional violators do not even ponder about the antitrust laws and possible violations thereof, so it is impossible to deter these persons even with tenfold damages.

Mandatory treble damages have existed in our antitrust laws for seventy-eight years, and except for situations like the electrical price-fixing cases (wilful violations were involved), they have been ineffective. Even in the electrical cases treble damages were not an effective deterrent, they were only effective in providing compensation. It is time we give another system a chance to operate and prove its worth. It could hardly be less effective.

### III. SECTION 7 OF CLAYTON AS AN ANTITRUST LAW WITHIN THE MEANING OF SECTION 4 OF CLAYTON<sup>46</sup>

As was noted earlier, one of the elements of plaintiff's case under section 4 is that he must prove that defendant has violated one of the antitrust laws. This presents the complex issue of "what constitutes a violation of the laws." Since the case of *Gottesman v. General Motors Corp.*,<sup>47</sup> the courts have also been struggling with the collateral question of "what constitutes an antitrust law." Before *Gottesman*, most authorities had assumed without question that section 7 of Clayton was an antitrust law and that an action for treble damages would lie thereunder. The district court in *Gottesman* noted that section 7 involves an "incipiency test"—i.e., is there a reasonable probability that the acquisition will result in the condemned restraint of trade—and then went on to hold that "[p]laintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7."<sup>48</sup> This line of reasoning was quickly adopted by other courts.<sup>49</sup> The position taken by these courts has two issues: the ques-

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<sup>46</sup> Other articles on this same subject include: Day, *Private Actions Under Section 7 of the Clayton Act*, 29 A.B.A. ANTITRUST SECTION 155 (1965); Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747 (1965); Note, *Availability of Divestiture in Private Litigation As a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267 (1964); 64 COLUM. L. REV. 597 (1964); 53 GEO. L.J. 1133 (1965); 79 HARV. L. REV. 445 (1965).

<sup>47</sup> 221 F. Supp. 488 (S.D. N.Y. 1963), *cert. denied*, 379 U.S. 882 (1964).

<sup>48</sup> *Id.* at 493.

<sup>49</sup> *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 728 (8th Cir. 1964) (dictum), *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964).

tion of causation, and a purely legal issue of whether section 7 is an antitrust law. The causation question is a mixture of proximate cause and actual cause. As a matter of policy, the courts have decided that section 4 was intended to protect plaintiffs from injuries that result solely from restraints of trade. It is the restraint that is condemned. Since a section 7 violation can be achieved by a mere potential restraint of trade, the plaintiff cannot show any actual causation between his injury and an existing restraint of trade or violation of the law. To bolster their position, these courts have also decided that section 7 is not an antitrust law within the meaning of section 4. The main support for this argument comes from the fact that section 16 of Clayton<sup>50</sup> gives private litigants the right to enjoin violations of the antitrust laws, "including sections two, three, seven, and eight" of Clayton. If Congress considers section 7 an antitrust law, it certainly would not have felt the need to point out specifically in section 16 that the injunctive remedy is available for section 7 violations.

As was to be expected, other courts, including the *Dailey* court, have not accepted this logic.<sup>51</sup> The Fifth Circuit in *Dailey* did not elaborate on the issue; it merely noted that there was a conflict of authority and that it believed the better view would include section 7 as an antitrust law for all purposes. *Rayco Mfg. Co. v. Dunn*<sup>52</sup> is cited as authority for the proposition that an action under section 4 will lie for a violation of section 7, however, there is some doubt as to whether it in fact did uphold such an action. The court laid down two prerequisites for the civil suit: (1) plaintiff must show that the acquisition did or might reasonably be expected to substantially lessen competition; and (2) that he suffered some special damage to his business or property as a result of that acquisition.<sup>53</sup> But then Judge Marovitz went on to state that plaintiff must show more than just the fact that his injury resulted from "extraneous actions" by defendant, the injury must result from the "lessened competition, or monopoly itself".<sup>54</sup> This statement effectively destroys any notion that an action will lie for a potential restraint of trade. *Julius M. Ames Co. v. Bostitch, Inc.*<sup>55</sup> is the other case cited in support of the action under section 4 but that case was not entirely generous to

<sup>50</sup> 15 U.S.C. § 26 (1964).

<sup>51</sup> See *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521 (S.D. N.Y. 1965); *Rayco Mfg. Co. v. Dunn*, 234 F. Supp. 593 (N.D. Ill. 1964).

<sup>52</sup> 234 F. Supp. 593 (N.D. Ill. 1964).

<sup>53</sup> *Id.* at 597.

<sup>54</sup> *Id.*

<sup>55</sup> 240 F. Supp. 521 (S.D. N.Y. 1965).

prospective plaintiffs. The court justified its decision, and differentiated *Gottesman* and the other opposing cases, on the ground that plaintiffs allegedly lost their distributorships "substantially at the moment" of the acquisition, and defendant's illegal conduct "cost plaintiffs immediate and present damage."<sup>56</sup> By distinguishing on the basis that plaintiff suffered his injury "substantially at the moment" of the acquisition, the court intentionally or unintentionally placed a severe restriction upon the action. In the *Dailey* case the plaintiff could not recover under this rule, for he did not lose his job until one year after the acquisition.

The *Dailey* court has gone farther than prior cases on this issue. It is submitted that this is the better view in light of the wording of the statutes. Section 7 is an antitrust law, plaintiff should have a cause of action under section 4 if it is violated, and there should be no greater requirements for proving a cause of action under it than there are for proving a cause of action under section 1 of the Sherman Act. Indeed the burden of proof should be lighter because of the "incipiency test". Section 1 of Clayton<sup>57</sup> defines "anti-trust laws" as including "this act." *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*<sup>58</sup> also defines "anti-trust laws" as including the Clayton Act. It seems illogical and in direct conflict with Congress' mandate to conclude any other way. And if section 7 is an antitrust law, there is no reason for distinguishing between it and the other laws. If a merger violates section 7, and if plaintiff is in fact injured in his business or property as a result of that merger, whether it be on the day of the merger or one year later, he should recover for that injury. He is not hurt by a potential restraint of trade, he is hurt by an illegal merger. Section 4 of Clayton gives plaintiff the right to recover for any injury sustained "by reason of anything forbidden in the antitrust laws". Congress did not forbid "restraint of trade" in section 7, rather it forbade certain acquisition which might have the effect of restraining trade. Plaintiff should be permitted to recover for injuries caused by that forbidden merger. The courts can still apply their normal standing requirements, and they can set up high standards for proof of actual injury. But these issues must be distinguished from the issue of whether an antitrust law has been violated. Sections 3<sup>59</sup> and 7 of Clayton

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<sup>56</sup> *Id.* at 524.

<sup>57</sup> 15 U.S.C. § 12 (1964).

<sup>58</sup> 332 F.2d 346, 350 (3rd Cir.), *aff'd*, 381 U.S. 311 (1964).

<sup>59</sup> 15 U.S.C. § 14 (1964).

have the same incipency test; the courts have had no difficulty in upholding treble damage actions alleging violations of that section.<sup>60</sup>

#### IV. RIGHT OF PRIVATE LITIGANTS TO SUE FOR VIOLATION OF SECTION 7 OF CLAYTON ACT

Although it seems clear under existing law that private litigants should be allowed to seek treble damages and an injunction<sup>61</sup> for a violation of section 7, it is not at all clear that this is a good public policy. Mergers are becoming increasingly vital in our economic scene. Assuming that they are neither per se good, nor per se bad, there is a need for some serious planning by our governmental agencies as to which mergers should stand and which should fall. The social, economic, and political factors that must be considered in determining the net positive or negative effect of a given merger are awesome in both their number and importance. The Attorney General's Report listed some of the factors which must be considered: "(1) the character of the acquiring and the acquired companies; (2) characteristics of the markets affected; (3) immediate changes in the size and competitive range of the acquiring company; and (4) the probable *long-range* effect that the acquisition may have on other companies in the market, and upon those potentially in the market." The report went on to say that "[w]e do not, of course, imply that all, several, or any one of these guides may be significant in a given case."<sup>62</sup> The committee is of the opinion that a careful analysis of the economic and marketing problems involved must be made with an understanding review of business conduct, and with a watchful eye toward the public interest. The committee recommends that these functions be given to well seasoned lawyers and economists before they reach the hands of a "zealous prosecutor, bent solely on court success."<sup>63</sup> Private litigants and the courts are neither qualified nor willing to make this demanding inquiry into the facts of each case. The private litigant is interested solely in amassing dollars in his own pocket—the public be damned! The courts do not

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<sup>60</sup> *Amplex of Md., Inc. v. Outboard Marine Corp.*, 380 F.2d 112, 115 (4th Cir. 1967) (by implication); *Alles Corp. v. Senco Prod., Inc.*, 329 F.2d 567 (6th Cir. 1964); *Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11 (6th Cir. 1959).

<sup>61</sup> *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Highland Supply Corp. v. Reynolds Metals Co.*, 245 F. Supp. 510 (E.D. Mo. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521 (S.D. N.Y. 1965).

<sup>62</sup> ATT'Y GEN. REP., *supra* note 38 at 125.

<sup>63</sup> ATT'Y GEN. REP., *supra* note 38 at 358-9.

have the economic expertise to handle the job;<sup>64</sup> even if they did, they have abdicated their responsibility.<sup>65</sup> Fortas, now Justice Fortas of the Supreme Court, points out that the Court will strike down nearly every merger that is challenged if there is any proof of possible anti-competitive effects, without regard to whether the merger is good or bad for the economy overall. He notes that this places a profound obligation upon the Federal Trade Commission and the Justice Department to carefully determine when and whether the public interest will be served by attacking an acquisition. Their duty is not to enforce laws and win cases, but rather they must engage in economic regulation.<sup>66</sup> Bergson, a former Assistant Attorney General, agrees. He indicates there are only two facts that are certain in anti-merger law: (1) if the Supreme Court wants to strike down a merger, it can find a way; and (2) it is going to want to strike it down.<sup>67</sup> Oddly enough, the Justice Department and the Federal Trade Commission have decreased their attacks on mergers almost in proportion to their record of successes in court. They appear to have heeded the advice of writers like Fortas and Bergson and have assumed, to a great extent, the role of economic planners.<sup>68</sup> But the real danger lies in the area of private litigation. Although section 7 has not been used to a large extent by private litigants in the past, the recent government victories against mergers have stirred up considerable interest. Coupled with the lightened burden of proof (the incipency test) and the probable willingness of the courts to consider section 7 an antitrust law, the new interest in using section 7 should be sufficient to awaken the "sleeping giant". Such a result can only be disastrous.

Several plans have been submitted for keeping section 7 activity in check. One writer suggests that private suits should be allowed for section 7 violations, but the test of proximate cause should be narrowly applied because the litigant may not be acting in the public

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<sup>64</sup> "To a large degree they [administrative agencies] have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940).

<sup>65</sup> Two recent cases by the Supreme Court have limited the scope of permissible economic inquiry in order to lighten the burden of proof. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States* 370 U.S. 294 (1962).

<sup>66</sup> Fortas, *Portents for New Antitrust Policy*, 10 ANTITRUST BULL. 41, 46-47 (1965).

<sup>67</sup> Bergson, *Merger Developments in the Supreme Court*, 26 A.B.A. ANTITRUST SECTION 233, 248-50 (1964).

<sup>68</sup> See Day, *supra* note 46 at 159-60.

interest.<sup>69</sup> The private litigant is never suing in the public interest no matter how limited standing is made. He is suing solely for his own benefit. Moreover, this plan will only serve to create artificial boundaries and unnecessary confusion in the law. We have been struggling with nonsensical standing requirements in other section 4 cases for seventy years, and we certainly do not need more problems of that nature.

Another writer suggests two plans.<sup>70</sup> One plan would make a government victory against the merger a prerequisite to any private action based upon that merger. While this may have its advantages, it also has a very serious drawback in that it completely eliminates the aid of private enforcement of section 7, thus placing a tremendous burden upon the resources of the government. The other plan involves a mandatory clearance procedure by the government of any merger that exceeds 5 million dollars in combined assets. The parties desiring to merge would be required to notify either the Justice Department or the Federal Trade Commission. This body would then make an investigation and decide whether clearance should be granted. If it is, private litigants could not subsequently attack the merger either for damages or an injunction. There are two possible forms of mandatory clearance programs: binding and non-binding clearance. Since a good merger may turn sour with the passage of time, and since it is usually impossible to predict how a seemingly healthy merger will work in operation, the binding clearance procedure is not flexible enough. Once the decision is made to clear a merger it cannot be revoked and nothing can be done to correct the problem until the anti-competitive effects become great enough to find an attempt to monopolize.

The non-binding clearance procedure would in essence be a "negative clearance" program. If the government does not approve of the merger, or if there are serious doubts about it, the government would inform the parties of this fact. On the other hand, the merger may appear to be a good one. In this situation the government does not send a letter urging the parties to go full speed ahead; rather, the parties are merely informed that at the present time no action is planned. When the merger is disapproved, either the government or private litigants are able to attack it if and when it is consummated. When negative clearance is granted, private litigants cannot bring suit unless that clearance is withdrawn at a later date. Anyone who

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<sup>69</sup> 79 HARV. L. REV. 445, 447 (1965).

<sup>70</sup> Day, *supra* note 46 at 160-62.

feels that clearance should not have been granted or that it should be withdrawn is free to inform the government of his complaint. Or the government may act of its own volition and notify the parties both privately and publicly that the merger is no longer considered to be in the public interest and both the government and private litigants will be free to attack it in the future. Litigants, of course, will not be able to claim any damages which occurred while the clearance was effective. The non-binding mandatory clearance procedure has the advantage of restricting private actions when it is determined by a body of experts that the merger has sufficient socio-economic justification, and the plan also makes it possible for the government to be informed of every important merger that is about to take place. Yet the clearance is not inflexible or irrevocable, and the incentive to private enforcement is not hampered in any serious manner if at all.

There are some details which would have to be worked out before such a plan could be enacted. One problem is whether there should be a procedure whereby the parties to the merger could protest to the government the decision to withdraw or deny clearance. This might be desirable, although it is not absolutely necessary since the parties still have ultimate recourse to the courts in any event. Another problem is whether the Justice Department should be given the power to issue clearance in conjunction with its duties as a prosecutor, or whether a special agency of expert economists and attorneys should be established to deal with all clearance questions. Since the number of mergers each year is large, it will probably be necessary to increase the appropriations for investigation, and perhaps there should be a mandatory deadline which the government must meet in either denying or granting clearance. These and other special problems which might arise under a mandatory clearance plan are beyond the scope of this note, but certainly they can be resolved.

A non-binding, mandatory clearance procedure cannot be achieved without congressional action. But if Congress does act, it could make one of the most significant contributions to our anti-trust laws and to our economy since the enactment of the Sherman Act in 1890.

*William Isaac*